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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. STEVEN MICHAEL BAUMGARTNER, Defendant and Appellant.	D075102 (Super. Ct. No. FSB 1403133)

APPEAL from a judgment of the Superior Court of San Bernardino County, Harold T. Wilson, Jr., Judge. Affirmed in part; reversed in part, remanded with directions.

Jamie L. Popper, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steven T. Oetting and Warren J. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

A jury found Steven Michael Baumgartner guilty of second-degree murder (Pen. Code, § 187, subd. (a)),[1] and found true allegations that he personally and intentionally discharged a firearm causing death (§ 12022.53, subd. (d)), personally and intentionally discharged a firearm (§ 12022.53, subd. (c)), and personally used a firearm (§ 12022.53, subd. (b)). The trial court sentenced Baumgartner to 40 years to life in prison, which included 15 years to life for the murder conviction and 25 years to life for the section 12022.53, subdivision (d) firearm enhancement. The court stayed execution of the remaining firearm enhancements.

On appeal, Baumgartner claims that the trial court erred in failing to define the meaning of the term "wrongful conduct" in a standard jury instruction pertaining to the doctrine of imperfect self-defense, and erred in instructing the jury pursuant to another standard jury instruction pertaining to the doctrine of contrived self-defense. Baumgartner also claims that defense counsel provided ineffective assistance in failing to request a modification or clarification of these two instructions. Baumgartner further contends that the trial court abused its discretion in admitting, for impeachment purposes, a statement that he made on Facebook that pertained to the murder victim. Baumgartner also claims that defense counsel provided ineffective assistance by failing to attempt to

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1 Unless otherwise specified, all subsequent statutory references are to the Penal Code.

restrict the jury's consideration of testimony and statements made by detectives investigating the killing. In addition, Baumgartner maintains that the prosecutor committed misconduct that requires reversal of the judgment. Baumgartner also contends that the cumulative error doctrine mandates reversal. We conclude that Baumgartner has not established any error that requires reversal of his convictions.

Baumgartner also requests that we reverse his sentence and remand for resentencing to allow the trial court to exercise its discretion to consider striking or dismissing the section 12022.53 firearm enhancements, in light of a change in the law. The People concede that the change in the law applies retroactively. Accordingly, we conclude that Baumgartner's sentence must be vacated and the matter remanded for resentencing to permit the trial court to exercise its discretion to determine whether to strike or dismiss the firearm enhancements. In all other respects, we affirm the judgment.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The People's evidence*

Victim Michael Clark lived with his wife, his thirteen-year-old step-daughter, C.C., and his best friend, Jeremy Jutras, among others. Clark lived next door to Baumgartner.

A few nights before the murder, Clark and his wife got into an argument at their residence. Baumgartner called the police about the Clarks' altercation and left his residence in his car immediately thereafter.

A few days later, at approximately 5:00 p.m., Clark and Baumgartner both arrived to their residences at around the same time. Clark angrily asked Baumgartner why he had called the police the other evening. Clark and Baumgartner were both yelling. C.C. heard Clark call Baumgartner a "pussy" and a "bitch." Jutras heard Clark and Baumgartner shouting at each other.

During the argument, Baumgartner went inside his house. Approximately 10 or 15 seconds later, Baumgartner emerged from his house holding a gun. Baumgartner approached Clark and pointed the gun in Clark's face and said, "Who is a bitch now?" Clark was standing on his property and Baumgartner was standing on his. According to C.C., the gun was approximately one foot from Clark's face.

Clark responded, "Go ahead and shoot me. I'm not on your property. I'm not afraid." Baumgartner shot Clark in the face and killed him. C.C. and Jutras testified that Clark was unarmed and that he was not holding anything in his hands at the time Baumgartner shot him.

Jutras immediately called 911. Police arrived shortly thereafter and arrested Baumgartner.

Detectives Edward De La Torre and Matthew Peterson interviewed Baumgartner. During the interview, Baumgartner claimed that the incident started when Clark began insulting him and angrily asking Baumgartner why Baumgartner had called the police on Clark. Baumgartner said that Clark threatened to "kick [his] ass," and "destroy [his] car." According to Baumgartner, Clark then picked up a rock. Baumgartner went inside his house and got a gun.

Detective De La Torre asked, "And, why did you come back out?" Baumgartner responded, "Because I thought my, my car, he was gonna break the car with a, with a rock or, or he's gonna hit me with the rock." Baumgartner claimed that when he returned with a gun, Clark told him, "I'm gonna cave your head in with this rock," and advanced toward Baumgartner. Baumgartner said that he shot Clark because he feared that Clark would injure him with the rock.

B. *The defense*

Baumgartner testified that when he arrived home on the day of the shooting, Clark told him, "I'm going to break your car." Clark called Baumgartner a "bitch ass snitch" and asked Baumgartner why he had called the sheriff. According to Baumgartner, Clark then picked up a rock and said, "I'm going to bash your head in. I'm going to kill your dogs and I'm going to bash your wife's head in." Baumgartner ran inside his house and retrieved a gun because Clark was chasing after him.

As soon as he retrieved the gun, Baumgartner started to run back outside the house. One of Baumgartner's dogs ran outside the house. Baumgartner chased after the dog and eventually was able to catch up with the dog and grab her.

According to Baumgartner, as he was grabbing his dog, Clark said, "Oh, you brought a gun out here." Baumgartner claimed that Clark began threatening him again while making lunging motions and raised his arm while holding a rock. After the third time that Clark raised his arm, Baumgartner "cocked the weapon and it instantly went off." Baumgartner added that he cocked the gun because, "I felt that I was in immediate

danger." Baumgartner explained that he feared that Clark would hit him with the rock or throw the rock at him.

III.

DISCUSSION

A. *The trial court did not err in failing to define the meaning of the term "wrongful conduct" in a standard jury instruction pertaining to imperfect self-defense; defense counsel did not provide ineffective assistance in failing to request a modification or clarification of the instruction*

Baumgartner contends that the trial court erred in failing to define the meaning of the term "wrongful conduct" in a standard jury instruction pertaining to imperfect self-defense.[2] Baumgartner also maintains that defense counsel provided ineffective assistance in failing to request a modification or clarification of the instruction.

1. *Factual and procedural background*

During the trial, at a jury instruction conference outside the presence of the jury, defense counsel requested that the trial court instruct the jury on voluntary manslaughter premised on imperfect self-defense.

The trial court instructed the jury pursuant to a modified version of CALCRIM No. 571 pertaining to voluntary manslaughter and imperfect self-defense as follows:

> "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense.

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[2] Baumgartner argues that "[w]hile this instruction explicitly applied to *imperfect* self-defense, a reasonable juror also could have applied it to [*perfect*] self-defense . . . ." (Italics added.) Even assuming that this is so, for the reasons discussed below, we find no error, whether the instruction is applied to imperfect or perfect self-defense.

"If you conclude that the defendant acted in complete self-defense, his action was lawful and you must find him not guilty of any crime. The difference between complete self-defense and imperfect self-defense depends on whether the defendant's belief in the need to use deadly force was reasonable.

"The defendant acted in imperfect self-defense if:

"1. The defendant actually believed he was in imminent danger of being killed or suffering great bodily injury;

"AND

"2. The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger;

"BUT

"3. At least one of those beliefs was unreasonable.

"Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be.

"In evaluating the defendant's belief, consider all the circumstances as they were known and appeared to the defendant.

"A danger is imminent if, when the fatal wound occurred, the danger actually existed or the defendant believed it existed. The danger must seem immediate and present so that it must be instantly dealt with. It may not be merely prospective or in the near future.

"*Imperfect self-defense does not apply when the defendant, through his own wrongful conduct, created circumstances that justify his adversary's use of force*.

"Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

"The People have the burden of proving beyond a reasonable doubt that the defendant was not acting in imperfect self-defense. If the People have not met this burden, you must find the defendant not guilty of murder." (Italics added.)

During deliberations, the jury sent the trial court a note requesting "[f]urther information on the 'Stand your Ground' laws."

In response, the trial court instructed the jury to refer to a series of standard CALCRIM instructions pertaining to self-defense that the trial court had previously read to the jury.[3]

2. *Governing law and standard of review*

a. *Relevant law pertaining to jury instructions*

" 'A court must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial.' " (*People v. Moon* (2005) 37 Cal.4th 1, 25.) In *People v. Estrada* (1995) 11 Cal.4th 568, 574 (*Estrada*), the California Supreme court outlined the circumstances under which a trial court has a sua sponte duty to instruct a jury on the meaning of a term:

> "When a word or phrase ' "is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to give an instruction as to its meaning in the absence of a request." ' [Citations.] A word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that *differs* from its nonlegal meaning."

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[3] Specifically, the court instructed the jury to refer to CALCRIM Nos. 505, 3472, 3474, 3475, and 3436. CALCRIM No. 505 outlines the elements of self-defense and, as discussed in part III.A.3, *post*, provides, in part that a "defendant is not required to retreat." CALCRIM No. 3472 is discussed in part III.B, *post*, and provides generally that a defendant does not have the right to provoke a fight with the intent to create an excuse to use force. CALCRIM No. 3474 provides generally that the right to self-defense continues only so long as the danger reasonably appears to exist. CALCRIM No. 3475 outlines a defendant's right to use force in ejecting a trespasser. In referring to CALCRIM No. 3436, the court was likely intending to refer to CALCRIM No. 3476, which outlines a defendant's right to use force in defending real or personal property.

An appellate court applies the de novo standard of review in determining whether the trial court had a duty to give a particular jury instruction sua sponte. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.) Further, " 'a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' " (*Id.* at p. 570.)

b. *Relevant substantive law*

In *In re Christian S.* (1994) 7 Cal.4th 768, 771 (*Christian S.*), the California Supreme Court summarized the doctrine of imperfect self-defense as follows: "Under the doctrine of imperfect self-defense, when the trier of fact finds that a defendant killed another person because the defendant actually but unreasonably believed he was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and thus can be convicted of no crime greater than voluntary manslaughter." (Italics omitted.)

The *Christian S.* court also explained that the doctrine of imperfect self-defense may not be invoked by a defendant who engages in "wrongful conduct" under the following circumstances:

> "It is well established that the ordinary self-defense doctrine—applicable when a defendant reasonably believes that his safety is endangered—may not be invoked by a defendant who, through his own *wrongful conduct* (e.g., the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified. [Citations.] It follows, a fortiori, that the imperfect self-defense doctrine cannot be invoked in such circumstances. For example, the imperfect self-

> defense doctrine would not permit a fleeing felon who shoots a pursuing police officer to escape a murder conviction even if the felon killed his pursuer with an actual belief in the need for self-defense." (*Christian S., supra*, 7 Cal.4th at p. 773, fn. 1, italics altered.)

The California Supreme Court has repeatedly endorsed this limitation on the application of the imperfect self-defense doctrine. (See, e.g., *People v. Rangel* (2016) 62 Cal.4th 1192, 1226 (*Rangel*); *People v. Enraca* (2012) 53 Cal.4th 735, 761 (*Encara*); *People v. Valencia* (2008) 43 Cal.4th 268, 288 (*Valencia*).)

3. *The trial court did not err in failing to define the meaning of the term "wrongful conduct," in CALCRIM No. 571*

Baumgartner contends that the trial court had a sua sponte duty to define the term "wrongful conduct," in the italicized portion of the instruction quoted in part III.A.1, *ante*, because the term has a "technical legal definition." Although Baumgartner does not offer a specific definition of wrongful conduct that he contends the court should have provided, he suggests that the term in this context means conduct that is "comparable to illegal behavior . . . [or] the initiation of a physical assault." Baumgartner further argues that such a definition was required in this case because a reasonable juror "could have understood [Baumgartner] calling police on the Clarks without warning or [Baumgartner] bringing a gun outside for protection as precluding [imperfect] self-defense, because the juror deemed either or both 'wrong.' "

We are not persuaded. To begin with, we are aware of no authority, and Baumgartner cites none, that supports the proposition that the term "wrongful conduct" has a technical legal definition in this context that "differs from its nonlegal meaning,"

such that a sua sponte instruction would be required. (*Estrada*, *supra*, 11 Cal.4th at p. 574.) On the contrary, the Supreme Court has repeatedly used the phrase "wrongful conduct" in describing this limitation on the applicability of the doctrine of imperfect self-defense without any suggestion that the term has a technical legal definition. (See, e.g., *Rangel*, *supra*, 62 Cal.4th at p. 1226; *Enraca*, *supra*, 53 Cal.4th at p. 761; *Valencia*, *supra*, 43 Cal.4th at p. 288.) Further, we are aware of no authority that supports the contention that the wrongful conduct limitation on the imperfect self-defense doctrine is restricted to the *examples* of wrongful conduct provided in *Christian S.* (See *Christian S.*, *supra*, 7 Cal.4th at p. 773, fn. 1 [stating that the doctrine of imperfect self-defense "may not be invoked by a defendant who, through his own wrongful conduct (*e.g.*, the initiation of a physical assault or the commission of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified" (italics added)].)

Moreover, as Baumgartner acknowledges, CALCRIM No. 571 does *not* broadly state that a defendant who engages in any "wrongful conduct" is unable to invoke the doctrine of imperfect self-defense. Rather, CALCRIM No. 571 provides that imperfect self-defense does not apply when a defendant engages in wrongful conduct that "has created circumstances that justify his adversary's use of force." Thus, the instruction narrows the type of wrongful conduct that precludes the application in a manner consistent with *Christian S.* (See *Christian S.*, *supra*, 7 Cal.4th at p. 773, fn. 1, [indicating that the doctrine of imperfect self-defense does not apply when the defendant's "wrongful conduct . . . has created circumstances under which his adversary's attack or pursuit is legally justified"].)

We reject Baumgartner's argument that the narrowing language in CALCRIM No. 571 is insufficient "[w]ithout the [word] 'legally' before 'justify' . . . ." A reasonable juror would understand that the term "justify" in this context means "legally justify," particularly since the jury was instructed that "[i]f a person kills with a *legally valid* excuse of *justification*, the killing is lawful and he or she has not committed a crime." (CALCRIM No. 500, italics added.) Further, other standard self-defense jury instructions use forms of the word "justify" to mean "legally justify," including those given in this case. For example, the trial court instructed the jury pursuant to CALCRIM No. 505 that "[t]he defendant is not guilty of murder or manslaughter if he was justified in killing someone in self-defense." (See *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088 [" ' "In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given" ' "].) In short, a reasonable juror would have understood CALCRIM No. 571 as precluding the application of the imperfect or perfect self-defense doctrines only if Baumgartner committed wrongful conduct that *legally* justified Clark's use of force. Such an instruction comports with California law.

To the extent that Baumgartner's brief may be read to assert a claim that the instruction was "erroneous" because there was no substantial evidence that Baumgartner's act in retrieving the gun during the altercation constituted "wrongful conduct," we

disagree.[4] Even assuming, strictly for purposes of this opinion, that Baumgartner is correct that it was not wrongful for him to "get the gun to defend his property," the jury was not required to "believe[ ] [Baumgartner's] version of events."[5] The People presented evidence from which the jury could have found that Baumgartner retrieved a gun and angrily pointed it at Clark after Clark accused him of having called the police on Clark a few nights prior to the killing. If the jury did so find, then the jury could have reasonably further determined that Baumgartner's act of pointing a gun at Clark constituted wrongful conduct that precluded Baumgartner from invoking the doctrine of perfect or imperfect self-defense. Thus, there was evidence supporting the trial court's instruction to the jury that Baumgartner did not act in either perfect or imperfect self-defense if he committed wrongful conduct that justified Clark's use of force.

Baumgartner also suggests that the trial court was required to "clarify the intersection between stand your ground and self-defense laws once the jury requested assistance." In response to the jury's general request for "[f]urther information on the 'Stand your Ground' laws," the trial court referred the jury to the court's self-defense instructions, including CALCRIM No. 505, which provides in relevant part:

> "A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably

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4 Baumgartner argued in his opening brief: "The instruction was erroneous or ambiguous, because reasonable jurors could have understood it to preclude appellant acting in [imperfect] self-defense based on their opinion calling police without warning or coming outside with his gun was 'wrongful conduct.' "

5 We quote from Baumgartner's brief.

> necessary, to pursue an assailant until the danger of death or great bodily injury is pas[t]."

Baumgartner fails to demonstrate that this was an incorrect or insufficient response. This is particularly true since there is nothing in the jury's question that suggested that the question was related to that portion of the court's imperfect self-defense instruction pertaining to a defendant's wrongful conduct.

4. *Defense counsel was not ineffective in failing to seek modification and/or clarification of the instruction*

Baumgartner also contends that defense counsel provided ineffective assistance in failing to seek modification and/or clarification of the instruction. Specifically, Baumgartner argues, "A reasonable attorney would have requested 'wrongful conduct' be defined to ensure jurors did not interpret bringing the gun outside legally or calling police as 'wrongful.' "

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient in that it "fell below an objective standard of reasonableness," evaluated "under prevailing professional norms." (*Strickland v. Washington* (1984) 466 U.S. 668, 688 (*Strickland*); accord, *People v. Ledesma* (1987) 43 Cal.3d 171, 216.) The defendant must also show that it is reasonably probable that a more favorable result would have been reached absent counsel's deficient performance. (*Strickland*, *supra*, at p. 694.)

"When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance." (*People v. Mai* (2013) 57 Cal.4th

986, 1009 (*Mai*).) Thus, "[w]hen the record on direct appeal sheds no light on why counsel failed to act in the manner challenged, defendant must show that there was ' " 'no conceivable tactical purpose' " for counsel's act or omission.' " (*People v. Centeno* (2014) 60 Cal.4th 659, 675 (*Centeno*).)

Baumgartner cites to no evidence in the record that pertains to why defense counsel did not request a modification or clarification of CALCRIM No. 571 insofar as it relates to a defendant's wrongful conduct. Nor can Baumgartner establish that there was "no conceivable tactical purpose" (*Centeno, supra*, 60 Cal.4th at p. 675) for counsel not to request that the jury be instructed that Baumgartner's acts in "bringing the gun outside legally or calling police" did not constitute wrongful conduct. With respect to Baumgartner's act in retrieving the gun from his home during the altercation, defense counsel could have reasonably determined that it was not in Baumgartner's interest for the jury to have its attention focused on this aspect of the case during its deliberations. Defense counsel also could have reasonably determined that it was not in Baumgartner's interest to have the jury be given an instruction that would have required it to consider whether he had brought "the gun outside *legally*."[6] (Italics added.) As discussed above, there is evidence from which the jury could have found that, rather than obtaining the gun in order to defend himself or his property, Baumgartner retrieved the gun and pointed it at Clark out of anger after having been insulted by Clark.

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6 We emphasize that we assume solely for purposes of this decision that Baumgartner is correct, as he repeatedly asserts in his brief, that "the law permitted [Baumgartner] to get the gun to defend his property."

With respect to Baumgartner's act in calling the police on an entirely separate occasion from the night of the killing, defense counsel could have reasonably determined that there was no danger that the jury would find that this act was wrongful conduct that justified Clark's use of force on the night of the shooting. Moreover, Baumgartner points to nothing in the record that would support such an unreasonable finding. More generally, as the People argue, defense counsel might have reasonably determined that it was not in Baumgartner's interest to "call attention to the phrase [wrongful conduct] at all . . . ."

Accordingly, we conclude that Baumgartner has not established that defense counsel provided ineffective assistance in failing to seek modification and/or clarification of the phrase "wrongful conduct" in the court's imperfect self-defense instruction.

B. *The trial court did not err in instructing the jury pursuant to CALCRIM No. 3472 concerning contrived self-defense; defense counsel did not provide ineffective assistance in failing to object to the instruction or requesting a modification of the instruction*

Baumgartner contends that the trial court erred in instructing the jury pursuant to CALCRIM No. 3472 pertaining to contrived self-defense because the instruction was "erroneously or ambiguously overbroad."[7] Baumgartner also maintains that defense counsel provided ineffective assistance in failing to object to the giving of the instruction or to request a modification of the instruction.

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7 Baumgartner argues that "[a]lthough this instruction explicitly applied to *self-defense*, a reasonable juror also could have applied it to *imperfect* self-defense." (Italics added.) Even assuming that Baumgartner is correct, for the reasons discussed below, we find no error, whether the instruction is applied to perfect or imperfect self-defense.

1. *Factual and procedural background*

During the trial, at a jury instruction conference outside the presence of the jury, the trial court asked defense counsel, "So the record is clear, [defense counsel], you are requesting the self-defense instructions?" Defense counsel responded in the affirmative.

The trial court instructed the jury pursuant to CALCRIM No. 3472 pertaining to contrived self-defense as follows:

> "A person does not have right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force."

As noted in part III.A.1, *ante*, during deliberations, the jury sent the trial court a note requesting "[f]urther information on the 'Stand your Ground' laws." In response, the trial court instructed the jury to refer to a series of standard CALCRIM instructions pertaining to self-defense that the trial court had previously given. (See fn. 3, *ante*.)

2. *Governing law and standard of review*

a. *Relevant law pertaining to jury instructions*

"A trial court may instruct on a theory only if it is supported by 'substantial evidence.' [Citation.] We review the trial court's assessment de novo." (*People v. Quiroz* (2013) 215 Cal.App.4th 65, 76 (*Quiroz*).) We also review de novo whether a challenged jury instruction states the " 'the applicable law correctly.' " (*People v. Kelly* (1992) 1 Cal.4th 495, 526; see *People v. Posey* (2004) 32 Cal.4th 193, 218.)

b. *Relevant substantive law*

In *People v. Eulian* (2016) 247 Cal.App.4th 1324, 1333 (*Eulian*), the Court of Appeal concluded that "CALCRIM No. 3472 is . . . generally a correct statement of law."

(Citing *Enraca, supra,* 53 Cal.4th at p. 761 [concluding that analogous CALJIC instruction[8] was supported by the evidence in the record].)

3. *The trial court did not err in instructing the jury pursuant to CALCRIM No. 3472*

Baumgartner contends that the trial court erred in instructing the jury pursuant to CALCRIM No. 3472 because the instruction was "erroneously or ambiguously overbroad," under the circumstances of this case. Specifically, Baumgartner argues that because "the law permitted [Baumgartner] to bring his gun outside to defend his property" and he was not required to retreat, "the fact [Baumgartner] brought his gun outside was immaterial to the issue of self-defense *under [Baumgartner's] version of events*." (Italics added.)

We again assume for purposes of this decision that Baumgartner is correct that the law permitted him to go get a gun during the altercation in order to defend his property. However, as explained in connection with our rejection of Baumgartner's claim as to CALCRIM No. 571, the People presented evidence from which the jury could have found that Baumgartner retrieved a gun and angrily pointed it at Clark after Clark accused him of having called the police a few nights prior to the killing, and that his purpose in retrieving the gun was not in fact to protect his property. If the jury did so

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8 In *Encara*, the trial court instructed the jury pursuant to CALJIC No. 5.55 that " '[t]he right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense.' " (*Encara, supra,* 53 Cal.4th at p. 761.) As the *Euilan* court explained, "the language of the two instructions [CALJIC No. 5.55 and CALCRIM No. 3472] is materially the same." (*Eulian, supra,* 247 Cal.App.4th at p. 1333.)

find, then the jury could have reasonably further determined that Baumgartner intended to provoke a fight or quarrel with the intent to use force. Thus, there was substantial evidence to support the giving of the instruction. (*Quiroz*, *supra*, 215 Cal.App.4th at p. 76.)

With respect to Baumgartner's claim that CALCRIM No. 3472 was ambiguous or overbroad, we reject Baumgartner's contention that "a reasonable juror could have understood CALCRIM [No.] 3472 erroneously to preclude imperfect and perfect self-defense based on [Baumgartner] bringing his gun outside to protect himself and his property." A juror could find that CALCRIM No. 3472 precluded Baumgartner's claim of self-defense only if the juror found that Baumgartner provoked a fight "with the intent to create an excuse to use force." A juror who found that Baumgartner retrieved a gun solely to defend himself and his property would not find that Baumgartner provoked a fight with the specific intention of instigating a fight as a pretext for firing the gun.

Baumgartner also contends that the trial court was required to "adequately respond to the jury question suggesting confusion between the intersection of stand your ground and self-defense laws." We reject this argument for the same reasons that we rejected Baumgartner's similar argument as to CALCRIM No 571. (See pt. III.A.3, *ante*.) By way of summary, the trial court properly referred the jury to the applicable self-defense instructions and there is nothing in the record demonstrating that the jury's question pertained to CALCRIM No. 3472.

4. *Defense counsel was not ineffective in failing to object to the instruction or to seek modification and/or clarification of the instruction*

We apply the law governing ineffective assistance of counsel claims outlined in part III.A.4, *ante*.

In his opening brief, Baumgartner argues that defense counsel was ineffective in "failing to object" to the giving of CALCRIM No. 3472. We reject this argument because any objection would have been without merit since, for the reasons stated above, there was substantial evidence supporting the instruction and the instruction correctly stated the law. (See *People v. Ramirez* (2003) 109 Cal.App.4th 992, 1002 ["Counsel is not ineffective for failing to raise futile objections"].)

To the extent that Baumgartner is arguing that defense counsel should have requested a modification or clarification of the instruction to indicate that Baumgartner's assumed lawful act of "bringing his gun outside to protect himself and his property," did not constitute provocation with the intent to create an excuse to use force, there is no evidence in the record as to why counsel did not request such an instruction. Further, Baumgartner cannot establish that there was " ' " 'no conceivable tactical purpose' " ' " (*Centeno*, *supra*, 60 Cal.4th at p. 675) for counsel not to request such a modification or clarification. As we explained in rejecting Baumgartner's ineffective assistance of counsel claim in part III.A.4, *ante*, defense counsel could have reasonably determined that it was not in Baumgartner's interest for the jury to have its attention focused on this aspect of the case during its deliberations.

Indeed, during his closing argument, defense counsel pursued the rational strategy of contending that this limitation did not apply because Baumgartner did not instigate the *incident*, telling the jury, "[T]he evidence is clear that Steve Baumgartner did not provoke this — start or provoke this *incident* to create an excuse to use force." (Italics added.) This was a sound tactical strategy that focused the jury on the most favorable evidence to Baumgartner in the entire case, namely, the undisputed evidence that he had not instigated the altercation with Clark. It was also reasonable for defense counsel not to request a modification of the instruction to inform the jury that Baumgartner's act of "bringing his gun outside to protect himself and his property" did not constitute provocation. Such a modification would have potentially undermined defense counsel's argument that Baumgartner had not instigated the incident by focusing the jury's attention on whether Baumgartner had provoked a quarrel by going into his house to obtain a gun *during* the incident.

Accordingly, we conclude that defense counsel was not ineffective in failing to object to CALCRIM No. 3472 or to seek modification and/or clarification of the instruction.

C. *The trial court's error in admitting a statement that Baumgartner made on Facebook was harmless*

Baumgartner contends that the trial court abused its discretion in admitting, for impeachment purposes, a statement that he made on Facebook. Baumgartner maintains that the trial court erred in admitting the Facebook statement because it was not

inconsistent with his trial testimony, as would have been required for proper admission of the statement. We agree.

1. *Factual and procedural background*

During the trial, the following colloquy occurred:

> "[Prosecutor:] Now, a few days before this incident on June 27, you had called the dispatch on them, right?
>
> "[Baumgartner:] Yes.
>
> "[Prosecutor:] And at that time you did not like them; right?
>
> "[Baumgartner:] I never said I didn't like them.
>
> "[Prosecutor:] Did you ever use the term that they were asses?
>
> "[Baumgartner:] No. No.
>
> "[Prosecutor:] You didn't think that they were asses?
>
> "[Baumgartner:] No.
>
> "[Prosecutor:] If I were show you a document in which you describe them as asses, would that refresh your recollection?
>
> "[Baumgartner:] Okay."

Shortly thereafter, defense counsel stated, "Objection. Request to approach, please." After an unreported sidebar, the prosecutor showed Baumgartner an exhibit, which Baumgartner acknowledged appeared to be a copy of his "Facebook page." The prosecutor then asked Baumgartner the following questions:

> "[Prosecutor:] Now, on one of the entries, on June 28th, what did you write?"
>
> "[Baumgartner:] Did you want me to read it?

"[Prosecutor:] Yes.

"[Baumgartner:] I made a comment on Facebook said [*sic*] I had enough last night, the neighbors fighting and breaking shit in their home. Called the sheriff to come sort their asses out.

"[Prosecutor:] You called them asses then.

"[Baumgartner:] I used the term then. I wasn't calling them asses as per se.

"[Prosecutor:] Safe to say that on the day that you called the police on them, that you did not like them?

"[Defense counsel:] Objection. Argumentative.

"[Baumgartner:] No.

"The Court: Sustained.

"[Defense counsel:] Asked and answered.

"The Court: Sustained."

During a trial recess, outside the presence of the jury, the trial court and the parties recounted the unreported sidebar discussion pertaining to the Facebook statement. The trial court indicated that the prosecutor had sought to admit the Facebook statement for impeachment purposes, defense counsel had objected, and the court admitted the statement for impeachment purposes. Defense counsel added that he would "still object as to relevance . . . ."

Later in the trial, the court admitted in evidence a copy of the statement from Baumgartner's Facebook page.[9]

During his closing argument, the prosecutor made two brief references to Baumgartner's Facebook statement. First, the prosecutor argued that Baumgartner had made numerous statements in the past that were inconsistent with his trial testimony. Nearly all of the statements to which the prosecutor referred were statements that Baumgartner made to detectives with respect to the altercation that resulted in the killing. However, the prosecutor did state the following:

> "First of all, I asked him if he ever called the Clarks asses. He said no. Well, the Facebook account shows otherwise."

The prosecutor also referred to the Facebook statement in one other portion of his closing argument, in arguing the following:

> "Motive. We are not required to prove any motive. If there's any motive, it's that the defendant did not like the Clarks. What do we have? Well, he called the police on them. He got so fed up with them he called the police on them. The Facebook entry said, [']I had enough last night. The neighbors fighting and breaking shit in their home. Called the sheriff to come sort their asses out.['] That's what he wrote on his Facebook page. That shows he was not enamored with the Clarks."

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9 The record indicates that the parties redacted irrelevant portions of the Facebook page.

2. *The trial court erred in admitting the Facebook statement to impeach Baumgartner because the statement was not inconsistent with his trial testimony*

a. *Governing law and standard of review*

" 'A statement by a witness *that is inconsistent with his or her trial testimony* is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in Evidence Code sections 1235 and 770.' " (*People v. Chism* (2014) 58 Cal.4th 1266, 1294, italics added.)[10] We review a trial court's decision to admit or exclude a statement under these provisions for an abuse of discretion. (*People v. Jones* (2013) 57 Cal.4th 899, 956.)

b. *Application*

Baumgartner was asked at trial whether he had "use[d] the term that [the Clarks] were asses," whether he had thought that the Clarks "were asses," and whether it would refresh his recollection to be shown a document in which Baumgartner "describe[d] [the Clarks] as asses . . . ."

The term "ass" has several meanings, two of which are relevant to this question. "Ass" may serve as informal derogatory reference to a "a stupid, obstinate, or perverse

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10 Evidence Code section 1235 provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770."

Evidence Code section 770 provides: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action."

person" (Webster's Collegiate Dict. (10th ed. 1998) p. 68 (Webster's).) The term "ass" may also be used colloquially to refer to a person's "buttocks," as an "emphatic reference to a specific person." (*Ibid.*) For example, Webster's provides the example of "get your [ass] over here." (*Ibid.*)

The prosecutor's questions at trial clearly were referring to the first meaning of "ass." (Webster's, *supra*, at p. 68.) The prosecutor asked Baumgartner whether he had stated that the Clarks "*were* asses," whether he thought that the Clarks "*were* asses," and about whether he had "*describe[d]* [the Clarks] *as* asses." (Italics added.) In contrast, Baumgartner's statement on Facebook that he "[c]alled the sheriff to come sort their asses out" was merely a colloquial expression indicating that Baumgartner had contacted law enforcement to help resolve the Clarks' quarrel. At most, Baumgartner's use of the term "asses" in this statement could be said to constitute an "emphatic reference" to the Clarks themselves. (*Ibid.*) However, it cannot be said that Baumgartner used the term "asses" in his Facebook post to refer to the Clarks as being "stupid, obstinate, or perverse person[s]" (*ibid.*) as suggested by the prosecutor's questions at trial.

Thus, we agree with Baumgartner that the trial court abused its discretion in admitting the Facebook statement because the statement was not inconsistent with his trial testimony.

3. *The trial court's error in admitting the statement was harmless*

a. *Standard of prejudice*

"The proper standard for review of . . . evidentiary error. . . is that for state law error under *People v. Watson* (1956) 46 Cal.2d 818, 836 (whether 'it is reasonably

probable that a result more favorable to [defendant] would have been reached in the absence of the error')." (*People v. Bacon* (2010) 50 Cal.4th 1082, 1104.)

b. *Application*

To begin with, the lack of any inconsistency between Baumgartner's testimony and his Facebook statement, supports the conclusion that the jury was unlikely to view the admission of the statement as having any significance. Further, in explaining the Facebook statement, Baumgartner testified, "I wasn't calling them asses as per se," thereby further mitigating the prejudicial impact of the improper admission of the statement.

Moreover, even if a juror considered Baumgartner's testimony and his Facebook statement to be inconsistent, it was at most a minor inconsistency about a collateral aspect of the case. This is particularly true given the undisputed evidence that Baumgartner's telephone call to the police to report the Clarks' loud argument had occurred a few days prior to the killing.

While we acknowledge that the prosecutor's references in closing argument to the improperly admitted Facebook statement heightened the "*potential* for prejudice" (*People v. Diaz* (2014) 227 Cal.App.4th 362, 384, italics added), the references were brief and did not form a significant part of the prosecutor's argument. Rather, the prosecutor focused the bulk of his argument on eyewitness testimony that was contrary to Baumgartner's version of the altercation that led to the killing, Baumgartner's admissions to law enforcement officers, and the numerous inconsistencies and omissions between Baumgartner's statements to law enforcement officers and his trial testimony. The

Facebook statement was, under any reasonable assessment, an exceedingly minor aspect of the trial.

We also acknowledge that, while there was strong evidence that Baumgartner committed a second-degree murder, in particular, eyewitness testimony that directly contradicted Baumgartner's testimony that the victim had threatened him with a rock just prior to the shooting, the evidence was not overwhelming. However, we cannot say that there is a reasonable probability that, had the jury not learned of Baumgartner's Facebook statement, he would have received a more favorable result.

In sum, Baumgartner "was entitled to a fair trial but not a perfect one." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009 (*Cunningham*).) We conclude that the trial court's error in admitting his Facebook statement was harmless.

D. *Defense counsel did not provide ineffective assistance in not moving to strike Detective Peterson's testimony and in not requesting either redaction of Baumgartner's police interview or a limiting instruction pertaining to the jury's consideration of the interview*

Baumgartner contends that defense counsel provided ineffective assistance in not moving to strike a portion of Detective Peterson's testimony. Baumgartner also argues that defense counsel provided ineffective assistance in not moving to redact various statements made by detectives during his police interview, a recording of which was played for the jury, and in failing to request a limiting instruction with respect to the jury's consideration of the interview.

1. *Factual and procedural background*

a. *Detective Peterson's testimony*

During the trial, defense counsel asked Detective Peterson several questions concerning the detective's state of mind while interviewing Baumgartner shortly after the killing:

> "[Defense counsel]: By the time you talked to [Baumgartner], you had already had an idea in your mind as to what happened; is that correct?
>
> "[Detective Peterson]: Of course.
>
> "[¶] . . . [¶]
>
> "[Defense counsel:] During the course of this interview, you told [Baumgartner] you were after the truth, didn't you?
>
> "[Detective Peterson]: Absolutely.
>
> "[Defense counsel]: And you told him that you were not hearing the truth from him, didn't you?
>
> "[Detective Peterson]: That's what I believed, yes.
>
> "[Defense counsel]: And steadfastly, without wavering, he told you, 'I am telling you the truth'?
>
> "[Detective Peterson]: Correct."

b. *Baumgartner's police interview*

During the trial, the People played a portion of Baumgartner's police interview with Detectives Peterson and De La Torre. Baumgartner contends that defense counsel was ineffective in failing to seek redaction or a limiting instruction with respect to

various statements made by the detectives during the interview. We summarize here the portions of the interview from which Baumgartner's claims arise.

Near the beginning of the police interview, Detective Peterson told Baumgartner that the police had spoken to a number of witnesses prior to his interview, and that the other witnesses had all been truthful. Later, after Baumgartner indicated that Clark had a rock in his hands during the altercation, Detective Peterson told Baumgartner that all of the witnesses said that Clark never had anything in his hands.

In response to Baumgartner's explanation of the shooting and how Clark fell backward even though Baumgartner claimed that Clark was running toward him at the time Baumgartner shot him, Detective De La Torre said, "Physics just don't allow that."

The detectives repeatedly told Baumgartner that he was not telling them the truth and that his story did not make sense. The detectives also told Baumgartner that the real reason that he shot Clark was out of revenge for Clark having called him a derogatory name.

Detective Peterson told Baumgartner during the interview that he should not have escalated the situation by coming back outside armed with a gun, and that instead, he should have remained inside and dialed 911. Detective Peterson also asked Baumgartner whether he was "familiar with . . . the laws of California . . . that you cannot shoot someone in defense of property[.]" The detectives also accused Baumgartner of committing the crime of brandishing a firearm, told him that he did not need his gun during the altercation with Clark, and repeatedly stated that he should have retreated into his house instead of shooting the victim.

2. *Ineffective assistance of counsel*

As outlined in pt. III.A.4, *ante*, to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance "fell below an objective standard of reasonableness," evaluated "under prevailing professional norms." (*Strickland*, *supra*, 466 U.S. at p. 688.) When considering an ineffective assistance claim we defer to "counsel's reasonable tactical decisions," and employ a "presumption [that] counsel acted within the wide range of reasonable professional assistance." (*Mai*, *supra*, 57 Cal.4th at p. 1009.)

" ' "[C]ourts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight" [citation]. "Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts." [Citation.]' " (*People v. Hinton* (2006) 37 Cal.4th 839, 876 (*Hinton*).)

3. *Application*

We consider first Baumgartner's claim that defense counsel should have moved to strike Detective Peterson's testimony that "[Baumgartner] was lying."[11] In support of this contention, Baumgartner notes that a police officer's opinion testimony with respect to a witness's honesty is not generally admissible. (Citing, e.g., *People v. Sergill* (1982) 138 Cal.App.3d 34, 40.) The excerpt of Detective Peterson's testimony quoted in part III.D.1.a, *ante*, supports the conclusion that defense counsel could have reasonably

11 We quote from Baumgartner's brief.

decided not to move to strike Detective Peterson's responses in an attempt to demonstrate that the police had predetermined the case before interviewing Baumgartner.

Trial counsel may have reasonably pursued this same tactical strategy in deciding not to seek redactions of the detectives' statements made during Baumgartner's police interview. Thus, even assuming that defense counsel would have been successful in obtaining redactions on the ground that there was a potential that the jury would consider the detectives' statements for impermissible purposes,[12] defense counsel may have reasonably determined that permitting the jury to hear the entirety of the police questioning furthered the defense's strategy of demonstrating that the police had prejudged the case prior to interviewing Baumgartner.

As a tactical matter, competent counsel also could have also rationally concluded that it would be counterproductive to request an instruction highlighting the statements that the detectives made during the interview. (See, e.g. *Hinton*, *supra*, 37 Cal.4th at p. 878 ["Defendant also complains that counsel's failure to request a limiting instruction concerning his prior murder conviction demonstrated ineffective assistance, but counsel may have deemed it unwise to call further attention to it"].)

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12 For example, Baumgartner argues that there was a danger that the jury would consider the detectives' statements with respect to the legality of his behavior for their truth, notwithstanding that a witness may not offer an opinion on the guilt or innocence of a defendant or the definition of a crime. (*People v. Torres* (1995) 33 Cal.App.4th 37, 45–46.) On the other hand, as Baumgartner acknowledges, interview questions are often admissible for the nonhearsay purpose of providing context for a defendant's answers. (See *People v. Maciel* (2013) 57 Cal.4th 482, 524.)

We are not persuaded by Baumgartner's contention that the fact that, prior to trial, defense counsel sought to suppress portions of his police interview demonstrates that "[defense] counsel's decision to not request redaction was not strategic."[13] Defense counsel's decision not to request redaction had to be made *after* the trial court had ruled that the bulk of the interview was admissible.[14] Thus, the fact that defense counsel *unsuccessfully* sought to suppress a portion of interview does not demonstrate that counsel's failure to seek redactions was not tactical. (See *Hinton*, *supra*, 37 Cal.4th at p. 876) [defense counsel's performance " ' "must be evaluated in the context of the available facts" ' "].)

Baumgartner's argument that "[a]ny reasonable trial attorney would have concluded that any benefit from an unredacted statement was overshadowed by the prejudice risked from police officer opinions [that] [Baumgartner] was lying and legally did not act with excuse or justification" is also unconvincing. Defense counsel could have reasonably determined that prejudicial impact of the jury learning that the law enforcement officers involved in Baumgartner's arrest and prosecution would think that

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13 While Baumgartner argues that defense counsel "attempt[ed] to exclude [Baumgartner's] interview on [*Miranda v. Arizona* (l966) 384 U.S. 436] grounds unsuccessfully," the record demonstrates that defense counsel sought to exclude only those portions of the interview that occurred approximately an hour and fifteen minutes into the interview, after Baumgartner told the detectives, "You guys are done talking to me, I guess." Thus, it is not the case, as Baumgartner suggests in his brief, that defense counsel sought to exclude the *entire* interview.

14 The trial court ruled that a short portion of the interview that occurred after Baumgartner invoked his right to remain silent would be suppressed. Baumgartner's invocation occurred after the detectives had interviewed Baumgartner for approximately an hour and 38 minutes.

he was lying in denying culpability was minimal. Counsel also could have reasonably determined that the admission of an unredacted interview provided the strongest possible basis for counsel to argue that Baumgartner had remained steadfast in his assertion that he had acted in self-defense from his initial police interview through trial. Defense counsel in fact presented such an argument in closing.

Finally, Baumgartner unpersuasively argues that the "jurors finding a reasonable doubt of [imperfect or perfect] self-defense or heat of passion was undeniably more important than showing the officers believed [Baumgartner] was lying from the start." It goes without saying that any attempt on the part of defense counsel to demonstrate to the jury that the detectives had prejudged the case would not have been a goal in and of itself, but rather, a tactical strategy to attempt to raise a reasonable doubt in the jury's mind with respect to Baumgartner's guilt.

Accordingly, we conclude that defense counsel did not provide ineffective assistance in representing Baumgartner in connection with Detective Peterson's testimony and Baumgartner's police interview.

E. *Baumgartner is not entitled to reversal of the judgment due to prosecutorial error*

Baumgartner contends that reversal of the judgment is required due to "pervasive prosecutorial misconduct." (Capitalization omitted) In the alternative, he argues that defense counsel was ineffective in failing to raise objections to several instances of alleged prosecutorial error. We first outline the law governing Baumgartner's claims and then discuss each of the four general areas of purported prosecutorial error that Baumgartner identifies in his brief.

1. *Governing law*

a. *Prosecutorial error*

"The use of deceptive or reprehensible methods to persuade the jury constitutes [prosecutorial] misconduct." (*People v. Sánchez* (2016) 63 Cal.4th 411, 475.) " ' "A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due process.' [Citations.] In other words, the misconduct must be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.' [Citation.] A prosecutor's misconduct that does not render a trial fundamentally unfair nevertheless violates California law if it involves 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' " (*People v. Covarrubias* (2016) 1 Cal.5th 838, 894.)

Not only is it improper for a prosecutor to use deceptive or reprehensible tactics to persuade a jury, "it is improper for [a] prosecutor to misstate the law . . . ." (*People v. Marshall* (1996) 13 Cal.4th 799, 831.)[15] However, "[p]rosecutors may make vigorous arguments and fairly comment on the evidence; they have broad discretion to argue inferences and deductions from the evidence to the jury. [Citation.]" (*People v. Reyes*

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15 While Baumgartner generally refers to the prosecutor's conduct as constituting prosecutorial *misconduct*, we refer to his claim as one of purported prosecutorial *error*. (See *People v. Potts* (2019) 6 Cal.5th 1012, 1036 (*Potts*) ["A claim of prosecutorial misconduct may have merit even absent proof that a prosecutor had 'a culpable state of mind.' [Citation.] For this reason, '[a] more apt description of the transgression is prosecutorial error.' " The unintentional misstating of the law may be considered a form of prosecutorial error.

(2016) 246 Cal.App.4th 62, 74.) "A defendant asserting prosecutorial misconduct must further establish a reasonable likelihood the jury construed the remarks in an objectionable fashion." (*People v. Duff* (2014) 58 Cal.4th 527, 568.)

In *People v. Forrest* (2017) 7 Cal.App.5th 1074, 1081, the Court of Appeal discussed the well-established law requiring that a defendant preserve a claim of prosecutorial misconduct (i.e., error):

> "To preserve a misconduct claim for review on appeal, ' "a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument." ' [Citations.] The underlying purpose of this requirement is to ' " 'encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had . . . .' " ' [Citation.] 'The objection requirement is necessary in criminal cases because a "contrary rule would deprive the People of the opportunity to cure the defect at trial and would 'permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal.' " ' [Citation.]"

A claim of prosecutorial error is reviewable on appeal notwithstanding the lack of a timely objection if an admonition would not have cured the harm from the prosecutor's remarks. (See, e.g., *Cunningham*, *supra*, 25 Cal.4th at pp. 1000–1001.)

b. *Ineffective assistance of counsel*

As discussed previously, to prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance "fell below an objective standard of reasonableness," evaluated "under prevailing professional norms," as well as prejudice stemming from such ineffective assistance. (*Strickland*, *supra*, 466 U.S. at p. 688; see pt. III.A.4, *ante*.)

"Because the decision whether to object is inherently tactical, the failure to object to evidence will seldom establish incompetence." (*People v. Freeman* (1994) 8 Cal.4th 450, 490–491; accord, *People v. Riel* (2000) 22 Cal.4th 1153, 1202 ["Whether to object at trial is among 'the minute to minute and second to second strategic and tactical decisions which must be made by the trial lawyer during the heat of battle' "].) Specifically, with respect to closing arguments, " '[t]he decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one . . . .' [Citation], and 'a mere failure to object to evidence or argument seldom establishes counsel's incompetence.' " (*Centeno, supra*, 60 Cal.4th at p. 675.)

2. *The prosecutor did not misstate the law through his questioning or during closing argument*

Baumgartner contends that the prosecutor misstated the law pertaining to self-defense and imperfect self-defense through his cross-examination of Baumgartner and during closing argument.[16]

Baumgartner contends that the prosecutor's cross-examination of him and the prosecutor's closing argument improperly indicated to the jury that Baumgartner's use of a firearm was not legally permissible because he had retreated into his home and then returned to the scene of the killing with a firearm. Baumgartner maintains that such questioning and argument constituted an improper misstatement of the law "because a person can act in self-defense and need not retreat, when another person puts him in

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16 Defense counsel did not object to the bulk of the alleged prosecutorial error referred to in this subpart. Nevertheless, we address Baumgartner's claims on the merits.

imminent danger of great bodily injury or death," and because "a juror reasonably could have found [Baumgartner] permissibly left his home with a gun to help ensure Clark did not harm his [car]."

The jury was instructed that in order for Baumgartner to have acted in self defense (either perfect or imperfect), he must have "believed that the immediate use of deadly force was necessary to defend against the danger." The prosecutor's arguments pertaining to Baumgartner's actions just before the killing were consistent with this aspect of the doctrine of self-defense. Indeed, the prosecutor specifically referred to this element in his closing argument, while contending that it was not necessary for Baumgartner to have committed the killing. With respect to Baumgartner's contention that the prosecutor's argument was improper because he was not required to retreat, the prosecutor specifically acknowledged this principle in his closing argument, but argued that it did not apply under the facts of this case:

> "You also have the [i]nstruction . . . [that] says that he is not required to retreat, that he can pursue the person if reasonably necessary until danger has passed. Let's look at the evidence. Danger, if any, had passed when the defendant went inside his house. When he went back inside his house, there was no more danger presented to him."

We see nothing objectionable in the prosecutor's argument, since it was tied to both a fair interpretation of the evidence and the applicable law.

Moreover, even assuming that Baumgartner is correct that it was lawful for him to return to the scene of the killing with a gun "to help ensure Clark did not harm his [car]," the prosecutor's argument was not that the law precluded Baumgartner from protecting his property, but that Baumgartner returned to the scene with the intent to seek revenge

rather than to protect his property and that Baumgartner responded to any threats that were made to him or his property with unreasonable force. In sum, the prosecutor did not misstate the law during cross-examination or in closing argument while discussing Baumgartner's decision to retreat into his home during the confrontation and return to the scene of the killing armed with a firearm.

Baumgartner also contends that the prosecutor "misstated the law in arguing [Baumgartner] could not use a gun in response to a rock." During his closing argument, the prosecutor stated the following:

> "Now, even if defendant believed that he was in imminent danger, that he had to use force immediately, he still used excessive force in this case. Why? First of all, there was no evidence of any struggle between the two. Look at this here, a gun versus a rock. Do you bring a gun to a fistfight? Do you bring a knife to a fistfight? No . . . [T]he force that he used was excessive, even if you believe that [Clark] had a rock in his hand. He cannot use a gun in response to the rock."

"A homicide is considered justified as self-defense where the defendant actually and reasonably believed *the use of deadly force was necessary* to defend himself from imminent threat of death or great bodily injury." (*People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732, 774, italics added.) " ' "[W]here the evidence is uncontroverted and establishes all of the elements for a finding of self-defense it may be held as a matter of law that the killing was justified; however, where some of the evidence tends to show a situation in which a killing may not be justified then the issue is a question of fact for the jury to determine." ' " (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1044.)

In this case, even assuming that Clark threatened Baumgartner with a rock, whether it was necessary for Baumgartner to use deadly force in response to such a threat clearly was a question of fact for the jury. It was not improper for the prosecutor to urge his view of the case. (See *People v. Peoples* (2016) 62 Cal.4th 718, 796 [" ' "prosecutor is given wide latitude to vigorously argue his or her case" ' "].)

In sum, we conclude that Baumgartner has not established that the prosecutor committed error by misstating the law applicable to the case.

3. *The prosecutor did not attack defense counsel's credibility*

Baumgartner contends that the prosecutor committed misconduct by making the following statement in closing argument:

> "The alleged defenses in this case are red herrings. The defense will nitpick every little thing to distract you."

Baumgartner contends that the statement "impermissibly attacked counsel's credibility."

We disagree. To begin with, the prosecutor's statements did not refer specifically to defense counsel, but generically referred to the "defense in this case" and the "[t]he defense." In any event, the prosecutor's comments were plainly fair argument and did not amount to improper prosecutorial error. (See, e.g., *Cunningham*, *supra*, 25 Cal.4th at pp. 1002–1003 [concluding that a prosecutor's statements that defense counsel's job was to " 'create straw men' " and " 'put up smoke, red herrings' " was not misconduct].)[17]

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17 In light of this conclusion, we need not consider whether the claim was preserved or whether Baumgartner's counsel was ineffective in failing to object.

4. *The prosecutor did not commit error by cross-examining Baumgartner in a way that suggested that the prosecutor believed that he was lying or by asserting in closing argument that Baumgartner was lying*

Baumgartner contends that the prosecutor committed error by indicating to the jury that the prosecutor believed that Baumgartner was lying. Baumgartner contends that the prosecutor's remarks constituted error because a reasonable juror could have understood the prosecutor's contentions to have been based on either the prosecutor's beliefs or evidence that was not presented at trial. (Citing *People v. Kirkes* (1952) 39 Cal.2d 719, 723 (*Kirkes*) ["It is well established that statements by the prosecuting attorney, not based upon legitimate inferences from the evidence, to the effect that he has personal knowledge of the defendant's guilt and that he would not conduct the prosecution unless he believed the defendant to be guilty are misconduct"].)

This claim fails because Baumgartner identifies no statements made by the prosecutor during cross-examination or closing argument[18] that suggested to the jury that the prosecutor's accusations that Baumgartner had fabricated his self-defense claim were based on either the prosecutor's personal beliefs or on evidence not presented at trial.

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18 Nor has our independent review uncovered any such statements.

Unlike in *Kirkes*, in which the prosecutor told the jury that he knew of the defendant's guilt before he became associated with the case, and added, "I would not have been associated with the prosecution of this particular case unless I had so believed," (*Kirkes*, *supra*, 39 Cal.2d at p. 722) the prosecutor in this case made no such comments. The mere fact that the prosecutor accused Baumgartner of lying did not constitute misconduct (see *People v. Armstrong* (2019) 6 Cal.5th 735, 796 ["[i]t is permissible to accuse a witness of being untruthful"]), particularly since the prosecutor repeatedly tied his accusations to the evidence in the case.

5. *The prosecutor did not attempt to absolve himself of the burden of proof or commit reversible error by improperly appealing to the jurors' emotions*

Baumgartner claims that the prosecutor improperly attempted to absolve himself of the burden of proof and improperly appealed to the jurors' emotions in his closing argument by stating:

> "The dumb part here is that the defendant is acting dumb. He is claiming that he is the victim here and that he acted in self-defense. What's the dumber part? He wants you to believe him. He wants you to be dumber than him and believe him. . . . This is Michael Clark. Does he deserve this?"

We conclude that the prosecutor's argument did not amount to an attempt to absolve itself of the burden of proof, since the argument neither mentioned the burden of proof nor suggested that the prosecutor's burden was anything less than proof beyond a reasonable doubt.

Whether the prosecutor's statements constituted an improper appeal to the juror's emotions presents a closer question. The prosecutor's suggestion that the jury would have to be "dumb" to believe Baumgartner's defense and the prosecutor's rhetorical question about whether the victim "deserve[d] this," likely constituted improper appeals to the jury's passions. (See, e.g., *People v. Sanders* (1995) 11 Cal.4th 475, 527 [" 'an appeal for sympathy for the victim is out of place during an objective determination of guilt' "].) However, defense counsel did not object, and an admonition plainly would have been sufficient to cure any harm. Thus, the claim of error is forfeited. (See, e.g., *People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1241.) Baumgartner cannot prevail on his claim of ineffective assistance of counsel since he cannot establish a reasonable probability of a different outcome had defense counsel objected at trial to the prosecutor's brief and isolated remark. (See *Strickland*, *supra*, 466 U.S. 668; *People v. Medina* (1995) 11 Cal.4th 694, 759–760 (*Medina*) [concluding that there was "no reasonable probability that the prosecutor's brief and isolated comments could have influenced the jury's guilt determination" where prosecutor asked the jury to " 'do the right thing, to do justice, not for our society, necessarily or exclusively, but for [murder victim] Craig Martin, an 18 year-old boy who was just working at a gas station one night' "].)

F. *The cumulative error doctrine does not require reversal of the judgment*

Baumgartner contends that the cumulative effect of the errors that he alleges requires reversal. "Under the 'cumulative error' doctrine, errors that are individually

harmless may nevertheless have a cumulative effect that is prejudicial." (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.)

Apart from a single evidentiary error that we have concluded was harmless (see pt. III.C, *ante*), and one minor claim of prosecutorial error (see pt. III.E.5, *ante*), we have rejected on the merits the remainder of Baumgartner's claims pertaining to his convictions. Accordingly, we conclude that the cumulative error doctrine does not require reversal of the judgment.

G. *The matter must be remanded for resentencing to permit the trial court to exercise its discretion to determine whether to strike or dismiss the firearm enhancements in light of a change in the law*

Baumgartner requests that we reverse his sentence and remand for resentencing to allow the trial court to exercise its discretion to consider striking or dismissing his section 12022.53 firearm enhancements[19] under section 12022.53 subdivision (h) as amended by Senate Bill No. 620 (2017-2018 Reg. Sess.) (Stats. 2017, ch. 682, § 2) (Senate Bill No. 620).

Senate Bill No. 620 amended section 12022.53, subdivision (h), to read:

> "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority

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19 As noted in part I, *ante*, the trial court imposed an enhancement of 25-years-to-life pursuant to section 12022.53, subdivision (d) to be served consecutively to the 15-years-to-life term imposed for the underlying offense of second-degree murder. The court also imposed enhancements under section 12022.53, subdivision (b) and subdivision (c), but stayed the execution of these enhancements.

> provided by this subdivision applies to any resentencing that may occur pursuant to any other law."

There was no similar provision prior to passage of Senate Bill No. 620.

Baumgartner contends that because the judgment in his case is not yet final, this court must apply the amendment retroactively under *In re Estrada* (1965) 63 Cal.2d 740, *People v. Francis* (1969) 71 Cal.2d 66, and other cases applying the *Estrada* rule.

The People concede that amended section 12022.53, subdivision (h) must be retroactively applied to nonfinal judgments. We accept the People's concession. (See *People v. Arredondo* (2018) 21 Cal.App.5th 493, 506–507 [concluding that Senate Bill No. 620 applies retroactively to nonfinal judgments].)

Accordingly, we conclude that Baumgartner's sentence must be vacated and the matter remanded for resentencing to permit the trial court to exercise its discretion to determine whether to strike or dismiss the firearm enhancements in light of amended section 12022.53, subdivision (h).

IV.

DISPOSITION

Baumgartner's sentence is vacated and the matter is remanded for resentencing. At resentencing, the trial court shall exercise its discretion in determining whether to strike one or more of the section 12022.53 firearm enhancements under section 1385 or again impose the enhancement terms. In all other respects, the judgment is affirmed.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.